

MEMORANDUM

SUBJECT: Referencing the 2018 Wehrum Reclassification Memorandum in MACT Applicability Determinations as to the Plain Language Reading of CAA 112

FROM: Susan Parker Bodine
Assistant Administrator

TO: Regional Administrators

We are providing this guidance to assist Regional Offices in determining when it is appropriate to reference or incorporate information from the 2018 Wehrum Memorandum¹ into either the analysis supporting the Applicability Determination (AD)² request or the AD itself. Use of this guidance will ensure consistency and legal accuracy across EPA in preparing MACT applicability determination responses referencing the 2018 Wehrum Reclassification Memorandum.

Preparing the response to the AD request:

Regional Offices have primary responsibility for developing responses to the majority of AD requests received from sources. If the analysis undertaken to determine applicability of a MACT results in the determination concluding that (1) a source is not subject to the rule based upon the facts of the case (e.g., review of construction dates, equipment removal dates, potential to emit (PTE) limits, permits, etc.) and (2) the determination is the same with or without the publication of the 2018 Wehrum Memorandum, then the AD does not need to refer to or include information from the Memorandum. Another way to state this is as follows: if the plain language reading of CAA 112 in the Memorandum and the

¹ EPA Memorandum from William L. Wehrum, “*Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act*,” to Regional Air Division Directors (January 25, 2018).

² For purposes of this Guidance, AD requests are written questions submitted by an individual source for a site-specific determination as to whether a specific rule applies to that source.

withdrawal of the 1995 “Once-In-Always-In” policy has no impact on determining applicability of the rule, then do not refer to, or include discussion of the Wehrum Memorandum.

If the analysis undertaken to determine applicability of a MACT results in the determination concluding that (1) a source is not subject to the rule based upon the facts of the case (e.g., review of construction dates, equipment removal dates, potential to emit (PTE) limits, permits, etc.) and (2) the determination relies on the plain language reading of the CAA 112 (a)(1) and (a)(2) definitions of major and area source discussed in the 2018 Wehrum Memorandum to support the reclassification of a major source to area source status, then reference to that plain language discussion should be included. In these circumstances, however, it is important to remember that the 2018 Wehrum Memorandum should not be cited as authority but only referred to as a memorandum where the plain language of the statute is explained; it is the plain language of the statute that provides the authority.

Presenting in the AD response the plain language reading of CAA 112 contained in the 2018 Wehrum Memorandum:

The below language should be used in an AD response that references the 2018 Wehrum Memo. Please note that this language may need minor changes to fit with the text of the AD being prepared. To ensure that any such changes made to this specific language are appropriate, the Regions should include Elineth Torres and Debra Dalcher of OAQPS ([HYPERLINK "mailto:torres.elineth@epa.gov"], [HYPERLINK "mailto:dalcher.debra@epa.gov"]) as part of the draft AD review process. Scott Jordan, OGC, is the staff attorney for any issues related to reclassification and is also available for consultation at [HYPERLINK "mailto:jordan.scott@epa.gov"]. For any applicability questions related to responding to such ADs, Sara Ayres, OECA is available for consultation at [HYPERLINK "mailto:ayres.sara@epa.gov"].

Language to be inserted into MACT AD responses that rely on the plain language reading discussed in the 2018 Wehrum Memorandum:

“On January 25, 2018, EPA issued guidance that supersedes the Agency’s previous position that a major source of hazardous air pollutants (HAP) could become an area source under the NESHAP program rather than comply with any applicable major source requirements only if the source obtained enforceable limits on its potential to emit (PTE) HAP prior to the first substantive compliance date of the standard. The policy, known as the “Once-In-Always-In” policy was contained in the 1995 Seitz Memorandum. As explained in the 2018 Wehrum Memorandum, the plain language definitions of major source and of area source in CAA section 112 (a)(1) and (a)(2), respectively, compel the conclusion that a major source that takes an enforceable limit on its PTE and brings its emissions of HAP below the applicable thresholds becomes an area source, will no longer be subject to the major source requirements after the effective date of the enforceable limits, so long as the source no longer emits HAP in excess of the major source definition.”

The reclassification of a previously major source of HAP to an area source of HAP through the imposition of enforceable limits on its PTE does not affect the obligation of the affected source to comply with the major source requirements prior to the effective date of the limits; nor does the reclassification to an area source shield the source from major source requirements if the source is determined to routinely exceed such limits or actually emits HAP at major source thresholds.

cc: Lawrence Starfield
Patrick Traylor
Deputy Regional Administrators
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